> That is right. We didn't know anything about them.

At the close of the plaintiff's evidence, the defendant moved orally for a directed verdict. The grounds of its motion (R., pp. 106-110) may be summarized as follows:

(1) that the bank was prejudiced by its failure to receive timely notice that the check was the property of petitioner;

(2) that there was no competent evidence that the check was the property of the petitioner;

(3) that the evidence established that the Maryland corporation was the agent of the petitioner, and that under the provisions of the Uniform Fiduciaries Act, the bank was not chargeable in the absence of actual knowledge of the breach of the agent's trust;

(4) that petitioner was estopped by the doctrine that when one of two innocent parties must bear a loss, the party whose actions set the possibility of loss in motion should bear it;

(5) that the claim was barred by the Statute of Limitations.

The trial court sustained this motion (R., p. 110), stating:

> The Court concludes on the basis of the testimony before it and confining its ruling, of course, to the testimony and the exhibits which are actually in evidence, that the plaintiff has not made a case against the bank. I don't think under the circumstances of this case that the defendant, American Security & Trust Co., is liable. . . .

> . . . I am convinced upon the basis of the testimony before me that there is no liability on the part of the bank under the peculiar circumstances of this case, and giving recognition to the fact that the defendant bank was not the bank upon whom the check was drawn, nor was it the bank in which the corporate account of the plaintiff was maintained. I believe that under all of these qualifying circumstances in this case that the Court is required to grant the motion for directed verdict for the American Security & Trust Company.

The Court of Appeals affirmed the judgment, originally basing its opinion upon the supposed assignment of Kahn Engineering Co., Inc.'s claim against Academy Construction, Inc., to Bright. The document to which the Court of Appeals referred was one of a series of documents identified by J. Leon Kahn as bearing his signature (R., p. 76). However, these documents were never offered nor received in evidence, because "appellee took care not to offer this document in evidence so that it might move for a directed verdict at the conclusion of the appellant's case, . . ." (Answer of Appellee to Petition for Rehearing, p. 1, R., p. 204)

The Court of Appeals thus based its action on a document which was not part of the record, and on a ground not urged by the respondent in its motion for directed verdict. The trial Court expressly refused to consider any exhibits except those actually admitted in evidence. (R., p. 110). Consequently, petitioner was denied relief upon a basis not argued at trial, and without consideration of the cogent reasons for asserting the invalidity of the supposed assignment.

The petition for rehearing called the attention of the Court of Appeals to the fact that alleged assignment had not been tendered in evidence. Consequently, the petition set forth, the petitioner had not argued the reasons why the supposed assignment was not binding upon the corporation. These reasons, specifically set forth in the Petition for Rehearing, (R., pp. 188-203) were

1. The assignment was not authorized by the corporation;

2. The document was not intended to assign the corporation's claim for the bank's tort, of which neither petitioner nor Kahn then had knowledge.

3. The purported assignment of petitioner's assets in exchange for the surrender and cancellation of its own stock was fraudulent as to its creditors.

In response to this petition for rehearing, the Court of Appeals, on February 26, 1959, amended its prior opinion by ordering the insertion of the following paragraph:

> Even assuming that the above assignment was ineffective, as to the subject matter of this litigation, plaintiff failed to make out a prima facie case that it was named payee of the check in question. There was no evidence whatsoever as to the actual intent of the maker and it could be reasonably inferred from the record that the plaintiff was not the named payee. Plaintiff thus failed to produce any evidence on a critical point of its case.

On the basis of this further statement, the Court of Appeals denied the Petition for Rehearing.

REASON FOR GRANTING THE WRIT

The writ of certiorari should be granted in this case because the action of the Court of Appeals, in affirming an erroneous direction of verdict by the trial court on a ground outside the record on which the petitioner had had no effective opportunity to be heard, was a patent departure from normal and accepted judicial procedure.

The trial Court directed a verdict against the plaintiff because of a claimed lack of privity between the petitioner and the collecting bank. (R., p. 110, 111). This ruling was erroneous because it was contrary to the decision of the Court of Appeals for the District of Columbia in *Merchants' Bank* v. *National Capital Press,* 53 App DC 59, 288 F 265, 31 ALR 1066, as well as the practically unanimous weight of authority.[1]

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[1] This decision of the Court of Appeals is in accord with the practically unanimous weight of American authority. Twenty-nine American jurisdictions have passed upon the issue and twenty-eight of these jurisdictions sustain the right of a payee or owner to recover against a bank which has collected his check upon an unauthorized endorsement. At present, only one jurisdiction holds to the contrary. The American jurisdictions which sustain the right of the owner to hold a collecting bank liable include *Alabama,* Allen v. M. Mendelsohn & Son, 207 Ala 527, 93 S 416, 31 ALR 1063, *Arkansas,* Schaap v. First National Bank, 137 Ark 251, 208 SW 309; *California,* George v. Security Trust & Savings Bank, 91 CA 708, 267 P 560; *Colorado,* U. S. Portland Cement Co. v. U. S. Bank, 61 Colo 334, 157 P 202, LRA 1917A, 145; *District of Columbia,* Merchants' Bank v. National Capital Press, *supra; Illinois,* Hamlin's Wizard Oil Co. v. U. S. Express Co., 265 Ill 156, 106 NE 623; *Indiana,* Indiana National Bank v. Holtsclaw, 98 Ind 85; *Iowa,* Home Indemnity Co. v. State Bank of Fort Dodge, 233 Iowa, 103, 8 NW 2d 757; *Kansas,* Railroad Bldg., Loan & Savings Assn. v. Bankers Mortgage Co., 142 Kan 564, 51 P 2d 61; *Kentucky,* Meyer v. Rosenheim, 115 Ky 409, 73 SW 1129; *Maryland,* National

The rule adopted by the trial Court is logically unsound, since it could result only in circuity and multiplicity of litigation.

Obviously, the proper forum for the correction of such an error is the Court of Appeals, and a petition to this Court should be unnecessary. However, the Court of Appeals did not respond to this issue—the only one legitimately before it. It avoided its respon-

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Union Bank v. Miller Rubber Co., 148 Md 449, 129 A 688; *Massachusetts*, A. Blum's Sons v. Whipple, 194 Mass 253, 80 NE 501; *Minnesota*, Moler v. State Bank of Bigelow, 176 Minn 449, 223 NW 780, 62 ALR 799; *Mississippi*, Thomas v. First National Bank, 101 Miss 500, 58 S 478; *Missouri*, Good Roads Machinery Co. v. Broadway Bank, Mo App , 267 SW 40; *New Hampshire*, Security Fence Co. v. Manchester Federal Savings & Loan Assn., 101 NH 190, 136 A 2d 910; *New Jersey*, Buckley v. Second National Bank, 35 NJL 400, 10 Am Rep 249; *New York*, People v. Bank of North America, 75 NY 547; *North Carolina*, Charles M. Britt Company v. Barefoot & Tatum Drugs, Inc., 240 NC 755; 83 SE 2d 883; *North Dakota*, Crisp v. State Bank, 32 ND 263, 155 NW 78; *Ohio*, Shæffer v. McKee, 19 Ohio St 526; *Oklahoma*, May v. City Bank & Trust Co., Okla , 258 P 2d 945; *Pennsylvania*, Lindsley v. First National Bank, 325 Pa 393, 190 A 876; *Tennessee*, Farmer v. People's Bank, 100 Tenn 187, 47 SW 234; *Texas*, Fidelity & Deposit Co. v. Fort Worth National Bank, 65 SW 2d 276 (Tex Comm App 1933); *Washington*, California Stucco Co. v. Marine National Bank, 148 Wash 341, 268 P 891, 67 ALR 1531; *Wisconsin*, National Surety Corporation v. City Bank & Trust Co., 248 Wis 32, 20 NW 2d 559; *Wyoming*, Trails Motors v. First National Bank, 76 Wyo. 152, 301 P 2d 775.

The only American jurisdiction presently holding to the contrary is Louisiana. M. Feitel House Wrecking Co. v. Citizens' Bank & Trust Co., 2 La App 118, aff'd 159 La 752, 106 S 292. At one time, Pennsylvania also denied recovery to the owner of the check, basing its holding on the lack of privity, but the case of Tibby Bros. Glass Co. v. Farmers' & Merchants Bank, 220 Pa. 1, 69 A 280, 15 LRA (NS) 519, was expressly overruled in Lindsley v. First National Bank, *supra*.

sibility for correcting the error of the trial Court by roving outside the record to find a document which had not been tendered nor admitted in evidence. On the basis of this document, as to the validity or admissability of which petitioner had had no opportunity to be heard, the Court affirmed the erroneous judgment. This Court has established as a rule of procedure the requirement that an affirmance on another ground than that utilized in the trial Court is erroneous, unless it is clear that the appellant can not be prejudiced by the action. *Peck* v. *Heurich*, 167 US 624; *Lutcher & Moore Lumber Co.* v. *Knight*, 217 US 257, 267; Cf. *Van Huffel* v. *Harkelrode*, 284 US 225, 229; *Farmers' Guide Co.* v. *Prairie Farmer Publishing Co.*, 293 US 268, 281. The Court of Appeals adopted this procedural guide for itself in *Scott* v. *Herrell*, 27 App DC 395, 401.

The importance of the case, an importance sufficient to invoke the supervisory jurisdiction of this Court, arises not from the issue decided but from the manner of its decision. Fundamental fairness requires that litigants be heard on a dispositive issue before their rights are adversely determined. The action of the Court of Appeals in failing to respond to the issue actually before it, and in determining the question of the assignment, deprived petitioner of this right to be heard on the validity of the instrument. Such an action strikes at the very heart of judicial fairness, and such a procedure, if approved *sub silentio*, would create real doubts as to the fairness of a judicial procedure which tolerates such determinations.

That the petitioner had available cogent reasons for the disregard of the putative assignment as a defense for the bank was made clear in the Petition for Rehearing. (R., pp. 188-202)

When this petition for rehearing was filed, the Court of Appeals again avoided a response to the issues. Instead, it ordered (R., p. 207) that its opinion be amended by inserting the statement that, as to the check in question, "There was no evidence whatsoever as to the actual intent of the maker, and it could reasonably be inferred from the record that plaintiff was not the named payee."

This statement, the petitioner submits with all respect to the Court of Appeals, is simply not true. The assertion that there is any doubt as to the identity of the intended payee of the check in question hangs upon the flimsy gossamer that the County made the check payable to "Kahn Engineering Company" (R., p. 118a) instead of to "Kahn Engineering Co., Inc." To deny the petitioner and its creditors the right to a substantial sum of money because of this most trivial misnomer, is of itself judicially indefensible.

While it is true that no official of the county was called to testify that the County intended to pay its debt to the person which it owed, there was substantial circumstantial evidence which rationally justified the conclusion that the check was intended for the petitioner. This circumstantial evidence included

1. The fact that the contract was with the petitioner, and it was the petitioner to which the money was owed. (R., p. 113 et seq.) By the law of Maryland, where the check was actually drawn, the existence of the written contract is dispositive of the issue of identity of the intended payee. *Lanasa* v. *Griswold*, 151 Md. 26, 32, 133 A 840.

2. Although the County had paid three checks. (R., pp. 56, 58, 60) to Kahn Engineering Co. of Md., Inc.,

the next check following the change of the name of the Maryland corporation to Academy Construction, Inc., was not made payable to Academy, and the really significant omission was that of the words, "of Maryland, Inc."

3. In the final settlement of the contract, the County officials claimed credit for this check as having been made to the petitioner. (R., p. 29)

The Court of Appeals has, in reality, determined as a matter of fact that it will choose which of two *fact* inferences—assuming that any inference that Academy Construction, Inc. was the intended payee is rationally supportable—it will accept. But the determination of fact questions and the drawing of inferences from the evidence is the province neither of the trial Court nor the Court of Appeals. That determination is the province of the jury alone. The citation of authority for such a fundamental rule is, we believe, wholly superfluous. The rule has been stated by this Court time and again (e.g., *Wilkerson* v. *McCarthy*, 336 US 53; *Stone* v. *New York C., & St. L. R. Co.*, 344 US 407; *Schulz* v. *Pennsylvania R. Co.*, 350 US 523).

The failure of the Court of Appeals to apply this fundamental distinction between the province of the Court and the province of the jury, a distinction required by the Seventh Amendment to the Constitution of the United States, was a second and again fundamental departure from the normal and accepted judicial procedure.

The full effect of the Court of Appeals' action was to deprive petitioner of a fair determination of its rights. It is for that reason that the petitioner seeks the aid of this Court, sincerely believing that the pro-

cedure of the Court of Appeals was so lacking in accord with basic and fundamental rules of procedure as to require the supervisory action of this Court.

CONCLUSION

For the foregoing reason, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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